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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 1361

LOUIS DELEO and ABRAHAM ABISROR,

Petitioners,

—against—

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled case on January 23, 1963 (12 N. Y. 2d 913).

No Opinions Below

No opinion was rendered by the City Magistrates' Court of the City of New York, Gamblers' Court, Borough of Brooklyn (F. X. O'BRIEN, *M.*, at time of conviction; JAMES E. LoPICCOLO, *M.*, at time of sentence). On appeal therefrom the Court of Special Sessions of the City of New York, Appellate Part, in the Second Judicial Department,

entered August 15, 1962, affirmed the judgments, without opinion.

An appeal was then taken by permission of an Associate Judge of the Court of Appeals from the aforesaid judgments. No opinion was rendered by the New York State Court of Appeals when the judgments were affirmed. (See *People* v. *De Leo, et ano.*, 12 N. Y. 2d 913.) However, the decision was sharply divided by a four to three majority. The minority of three Judges dissented and voted to reverse upon the authority of *People* v. *Pearlman and Bernstein* and *People* v. *Gognetta and Grecco* (decided December 31, 1962 in one opinion under the title of *People* v. *Caliente* [see 12 N. Y. 2d 89]).

A motion to amend the remittitur and for reargument was then made in the Court of Appeals. The order on remittitur was amended (see Appendix A).

Jurisdiction

The judgment of the New York State Court of Appeals was pronounced on the 23rd day of January, 1963, and on February 21, 1963, the Court of Appeals granted petitioners' application to amend the remittitur (see Appendix A) and amended same by adding thereto the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Fourth Amendment of the Constitution of the United States, viz: Whether the admission into evidence of material and statements obtained in the course of an alleged illegal search and seizure violated appellants' rights under the Fourth Amendment of the Constitution of the United States. The Court of Appeals held that appellants' constitutional rights had not been violated under the Fourth Amendment."

The jurisdiction of this Court is invoked under 28 U. S. C. A. §1257 (3).

Question Presented

The question presented for review is:

Whether the admission into evidence of material and statements obtained in the course of an alleged illegal search and seizure violated appellants' rights under the Fourth Amendment of the Constitution of the United States.

Procedural History of Case

Petitioners were convicted of bookmaking in violation of Section 986 of the New York Penal Law, Consol. Laws, c. 40, and of possession of bookmaking records in violation of Section 986-b of the New York Penal Law. The New York City Magistrates' Court, Gamblers' Part, Borough of Brooklyn, entered judgments, and the petitioners appealed.

The Appellate Part of the Court of Special Sessions of the City of New York affirmed the judgments on August 15, 1962.

Petitioners then appealed to the Court of Appeals of the State of New York. The judgments of conviction were affirmed January 23, 1963, without opinion (12 N. Y. 2d 913). A motion to amend the remittitur was granted. Petitioners had claimed that their constitutional rights had been violated under the Fourth Amendment of the Constitution of the United States.

Statement of the Case

The complaint charged that on September 12, 1961 petitioners "acting together and in concert in violation of section 986 of the Penal Law * * * unlawfully engaged in bookmaking, under the following circumstances: petitioners did receive, accept, record and register bets or wagers on horse races, and in violation of Sec. 986b of the Penal Law did have in their possession papers, writings or documents representing or being records made by persons engaged in bookmaking of bets or wagers on the results of contests of speed of beasts as follows", giving particulars.

Complainant, Detective Martin Russell, the only witness for the prosecution, testified that on September 11, 1961 he observed a man enter an empty store on two different occasions; that, on the following day, he again saw the man enter that store; that he thereupon stationed himself on the roof of the one-story building in which the store was located and looked down into the building through an open skylight; that he was then 12 to 15 feet away from the room into which he was looking and in which he saw two persons, identified as petitioners; that, during a five-minute period in which he thus had petitioners under observation, he observed each of them, on separate occasions, pick up the telephone, dial a number, hold the telephone with one hand and make notations on a sheet of paper with the other hand; that he also heard petitioners refer on the telephone to various amounts of money and to names of horses scheduled to run at race tracks on that day; that he then saw petitioner Abisror leave the premises; that, when petitioner Abisror returned, complainant "walked in the door, following" the said petitioner; that he saw six sheets of paper, with duplicate copies, lying on a table, and that he then identified himself to petitioners and placed them under arrest.

These sheets of paper, marked as Exhibit 1, contained notations of 73 bets on horses. Complainant further testified that he asked petitioner DeLeo where "the rest of these slips" were and received the reply "That's all the work there is" and that he asked petitioner Abisror "How long have you been taking bets here?" and received the reply that "I only started this yesterday."

Defense counsel moved to suppress all of the evidence on the ground that it was obtained as the result of an illegal search and seizure, and this motion was denied by the Trial Court.

The judgments of the City Magistrates' Court of the City of New York, Gamblers' Court, Borough of Brooklyn (F. X. O'Brien, *M.*, at time of conviction; James E. LoPiccolo, *M.*, at time of sentence) were affirmed by the Court of Special Sessions of the City of New York, Appellate Part, in the Second Department.

In the New York Court of Appeals the People of the State of New York argued that complainant, under the circumstances disclosed in the record, had a duty to investigate the activities being carried on in an apparently vacant and unoccupied store and that, his presence on the premises having been lawful, his subsequent arrest of petitioners, for *misdemeanors* committed in his presence, was lawful.

Petitioners argued that they were aggrieved persons entitled to the protection of the Fourth Amendment of the United States Constitution, the command of which rendered People's Exhibits 1-4 inadmissible in this action, and said Fourth Amendment to the United States Constitution bound the Court below by virtue of the due process clause of the Fourteenth Amendment to the United States Constitution.

Petitioners further contended:

a) There was an unreasonable search and seizure in violation of the Fourth Amendment to the United States Constitution binding upon the Trial Court, by virtue of the Fourteenth Amendment to the United States Constitution in that the police should have procured a search warrant.

b) The prosecution had the burden to establish that the arrest of the appellants, in the absence of a warrant of arrest was legal; the search and seizure was not reasonable in this case because it was not incidental to a valid arrest.

c) The incriminating statements attributed to the appellants were inadmissible and should have been excluded.

By a sharply divided Court, the Court of Appeals affirmed the judgments. The minority of three Judges as against the majority of four Judges dissented and voted to reverse the judgments upon the authority of *People* v. *Caliente*, *People* v. *Pearlman and Bernstein* and *People* v. *Cognetta and Grecco* [all decided December 31, 1962, in one opinion (see 12 N. Y. 2d 89, 236 N. Y. S. 2d 945, 187 N. E. 2d 550)].

It is significant to note that Associate Judge Froessel of the Court of Appeals retired at the close of proceedings on December 31, 1962 after Judge Froessel wrote the majority opinion in *People* v. *Cognetta, et al.*, 12 N. Y. 2d 89, *supra*, reversing judgments of all defendants, contemporaneously dismissing the complaints and remitting the fines in book-making cases similarly situated as in the case at Bar.

On January 1st, 1963 a newly elected Associate Judge of the Court of Appeals (John F. Scileppi, *J.*) ascended the Bench in place and stead of Judge Froessel.

Thereafter, and on January 9, 1963, the instant case of petitioners De Leo and Abisror was argued before the new Bench. On January 23, 1963, the same three judges who voted to reverse in a majority opinion written by Judge Froessel in *People v. Cognetta, et al., supra,* now become the three dissenters in the minority in the case at Bar for the reason that the new Jurist (Scileppi, *J.*) held contrary to the opinion of the Judge whom he replaced, thereby joining the three dissenters in the *Cognetta* case and changing the minority to a majority ruling.

Annexed hereto and forming part hereof as Appendix B is the opinion by Judge Froessel in the *Cognetta* case. In light of the favorable ruling in the *Cognetta* case and in view of the contrary decisional precedent which followed in the instant case, the State of New York has rendered conflicting applicable decisions.

REASON FOR GRANTING CERTIORARI

Certiorari should be granted because an important question affecting "search and seizure" clauses in the State Courts and the rights of petitioner under the Fourth and Fourteenth Amendment are involved.

In this case, nine days after the Court of Appeals of the State of New York had, by a sharply divided Court, reversed the judgments of appellant *Cognetta, et al., supra;* the same Court of Appeals, with the exception of Judge Scileppi, who replaced Judge Froessel, heard oral arguments in the case at Bar and subsequently overturned the previous ruling when Judge Scileppi voted to affirm this judgment.

Since the foregoing decisions of the State of New York are in conflict with one another, although the respective cases were decided within three weeks of each other, it is incumbent upon this Court to resolve this conflict to correct a consistent rule or yardstick. The case at Bar is deemed so important and epitomizes the myriad problems which beset the field of "Search and Seizure" violations. An unequivocal explanation by this Court to the Court below would serve to clarify this apparent conflict. Therefore, this Court should assume jurisdiction and grant the petition for the writ of certiorari. Moreover the New York State Court of Appeals has decided this important question of State and Federal Law in a way not in accord with the applicable decisions of this Court and with other States. Under the circumstances, this Court should make more definite and certain the question for the administration of criminal justice in the State Courts.

CONCLUSION

The petition for certiorari should be granted for the reasons relied on hereinbefore.

Respectfully submitted,

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Dated: May 14, 1963.

APPENDIX A

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-first day of February A. D. 1963.

Present,

HON. CHARLES S. DESMOND,

Chief Judge, presiding.

Mo. No. 156

THE PEOPLE &c.,

Respondent,

vs.

LOUIS DELEO and ABRAHAM ABISROR,

Appellants.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon, and due deliberation thereupon had, it is

ORDERED: that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there was presented and necessarily passed upon a question under the Fourth

Amendment of the Constitution of the United States, viz: Whether the admission into evidence of material and statements obtained in the course of an alleged illegal search and seizure violated appellants' rights under the Fourth Amendment of the Constitution of the United States. The Court of Appeals held that appellants' constitutional rights had not been violated under the Fourth Amendment.

And the Criminal Court of the City of New York is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Gearon Kimball
Deputy Clerk

[seal]

APPENDIX B

FROESSEL, *J.*: Each of the defendants in these four cases was convicted, after trial, of misdemeanors relating to bookmaking (Penal Law, §§986, 986-b). Each defendant urges that his conviction must be reversed because his constitutional rights were violated by the arresting officer's alleged illegal search and seizure, and the introduction against him of evidence obtained thereby. In each case the arresting officer acted without benefit of a search or arrest warrant, and unless the search be found to be incident to a lawful arrest, it would be illegal (*Johnson* v. *United States*, 333 U. S. 10, 15; *People* v. *Loria*, 10 N. Y. 2d 368, 373).

Section 177 of the Code of Criminal Procedure which sets forth the standard for a lawful arrest is clear and unambiguous. It authorizes an arrest for a *misdemeanor* only if the crime is committed in the arresting officer's presence. The lawfulness of the arrest does not depend upon the officer's suspicions, or even upon a reasonable belief on his part that a crime has been committed. In this respect the statute distinguishes between an arrest for a misdemeanor and an arrest for a felony. Unless the misdemeanor is committed in the officer's presence, he is not privileged to arrest the defendant, and evidence thereafter obtained as the result of a search is inadmissible (*Mapp* v. *Ohio*, 367 U. S. 643; *People* v. *Moore*, 11 N. Y. 2d 271). As we wrote in *People* v. *Loria* (10 N. Y. 2d 368, 373, *supra*), the legality of the arrest "cannot be based upon evidence obtained as a result of the search, which the validity of the search itself depends upon the legality of the arrest".

In each of these cases the evidence was insufficient to justify an arrest. In *People* v. *Caliente* the defendant was handed, in addition to paper money, paper slips, the nature of which was completely unknown to the arresting officer. The mere act of accepting such money and pieces of paper,

without more, does not constitute a crime. In *People* v. *Sessa* we find no controlling distinction from the facts in the *Caliente* case.

In *People* v. *Periman and Bernstein* a police officer called a telephone number and placed a number of bets on race horses and baseball games; he did not know with whom he was talking at the time. Thereafter he went across the street to certain premises and stationed himself outside a room in which was located the telephone which he had called. He stuck a pencil through a mail slot in the door, and saw and heard the defendants conversing over the telephone about placing bets. He then entered the room with a passkey furnished him by the building superintendent, placed the defendants under arrest, and thereupon made a search. The fact that, prior to the time the police officer penetrated the mail slot and entered the premises as aforesaid, he had placed bets over the telephone with persons then unknown, did not justify the entry and the arrest. (See, e.g., *Johnson* v. *United States*, 333 U. S. 10, 15, *supra*.)

In *People* v. *Coignetta and Greco* the officer stationed himself outside a store, from within which he heard telephone conversations indicating bets were being placed on horse races and football games. The store door was closed and locked. The officer climbed through the transom and entered the store, observed the defendants and placed them under arrest. This evidence was insufficient to authorize a search as an incident to a lawful arrest, since before entering the premises the officer did not know the identities of those to be charged or arrested. (See *Johnson* v. *United States*, *supra*.)

While it may well be true that the officers had probable cause to suspect that the defendants arrested had committed a crime, this does not meet the statutory test as provided in section 177. We are not unmindful of the difficulties the People face in obtaining evidence to establish violations

under the Penal Law in cases such as this, but our conclusion here is dictated as a result of *Mapp* v. *Ohio* (*supra*), and by section 177 of the Code of Criminal Procedure, as it now stands, which does not permit, under the circumstances presented by these cases, an arrest without a warrant for a misdemeanor, as such statute provides in cases of felonies.

Accordingly, the judgments should be reversed, the complaints dismissed, and the fines remitted.

DYE, J. (dissenting in *People* v. *Perlman and Bergstein*). After trial, defendants were found guilty of violation of section 986 (book-making) and section 986-b (possession of book-making records) of the Penal Law. The proof was that an officer called a telephone number listed in the name of Lang Premium, 1776 Broadway, on three occasions on the same day and placed a total of eight bets on horse races and baseball games. Thereafter, the officer went across the street to 1776 Broadway, entered and went to the seventh floor where he stationed himself outside Room 704. After obtaining a view of the room through the mail slot, opened with a pencil, the officer entered with a passkey furnished by the superintendent and arrested the defendants and seized certain betting slips and paraphernalia, which were admitted in evidence over defendants' objection. The contention herein is that the convictions must be reversed because evidence was admitted which was the result of an illegal search and seizure.

Under our procedure, a police officer may arrest for a misdemeanor only if it was done in his "presence" (Code Crim. Pro., § 177). Conforming that rule with the announcement contained in *Mapp* v. *Ohio* (367 U. S. 643), we have held that the proceeds of a search made pursuant to an arrest for a misdemeanor are inadmissible unless it appear that the officer perceived sufficient facts to justify submission of the factual issue to the trier of the facts (*People* v. *Moore*, 11

N. Y. 2d 271). In our view, the undisputed facts in this case justify the finding that book-making was done in the "presence" of the officer, which finding satisfies the requirements of section 177 of the Code of Criminal Procedure; and, therefore, the evidence is admissible. The completion of the various phone calls, and the recording of the bets perfected the crime. This, without more, should be sufficient to satisfy the statutory requirement of "presence", especially when the officer is privy to the conversations. "Personal *presence*" it has been said "includes corporeal extension within the sphere of sense perception" (*People* v. *Esposito*, 118 Misc. 867, 872) and is in accord with a very substantial number of out-of-State and Federal cases.

Under the circumstances, we are satisfied that the subsequent search of the premises was incidental to a lawful arrest. The question is not whether the officer had probable cause to arrest, independent of the facts of any alleged search and seizure (*Ruggs* v. *United States*, 273 U. S. 28; *Henry* v. *United States*, 361 U. S. 98), but whether when the officer entered there was evidence sufficient to justify a jury in convicting the defendant (*People* v. *Moore*, 11 N. Y. 2d 271). But even if it could be argued that the search and seizure was technically illegal, due to the circumstance that the officer opened the mail slot with a pencil and thus unreasonably invaded defendants' right of privacy, there is no showing that these defendants had any right to the privacy allegedly invaded. The Fourth Amendment contemplates only those searches that are unreasonable. Here, concededly, the premises were in the name of Lang Premiums. Whether these defendants were properly in the premises so as to entitle them to constitutional protection does not appear. The exclusionary rule of *Mapp* (*supra*) extends to those whose constitutional rights are disregarded. Rights may not be assumed for the purpose of exclusion. If the defendants had no status to claim the pro-

tection, obviously there is no good reason for excluding the evidence as fruits of an unlawful seizure. It must be the defendants' own privacy which is invaded by the officers. Evidence obtained in violation of the rights of some third person is not excludable (8 Wigmore, Evidence [3d ed.], § 2184*a*). I see no good reason for dispensing with status. Nor does it matter that the possessory crime (§ 986-b) was not done in the presence of the officer, for it is well-settled that, when articles come into an officer's possession in the course of a lawful search, they need not be returned because it was not one of the things that he had cause to look for (*Harris* v. *United States*, 331 U. S. 145; *Abel* v. *United States*, 362 U. S. 217, 241). Nor does it matter that the government acquired the same information it already legally had as a result of an illegal search (*Silverthorne Lbr. Co.* v. *United States*, 251 U. S. 385; *People* v. *Rodriguez*, 11 N. Y. 2d 279).

The judgment of conviction should be affirmed.

BURKE, *J.* (dissenting in *People* v. *Caliente*). The majority reverse the conviction because, since the acts of the defendant observed by the arresting officer did not, standing alone, constitute legally sufficient evidence to support a conviction, the misdemeanor was not committed in the "presence" of the policeman and the arrest was consequently unlawful and the additional, and admittedly adequate, evidence obtained through the search incident thereto inadmissible. This is a reading of section 177 of the Code of Criminal Procedure which seems inexplicable. I had always thought that a crime was being committed in one's presence if one was there while it was going on and could see, hear or otherwise sense what was happening. One is in the presence of an iceberg even though only that part above the water can be seen.

Up till now this court has held that it was for the jury to determine whether a misdemeanor had been committed

in the presence of the arresting officer. If the defendant was convicted of the misdemeanor for which he was arrested, and the arresting officer had been "present", as that word is ordinarily used, during the commission of the misdemeanor, that ended the matter and no action for wrongful arrest could ever be brought. Conversely, and it is this fact which I believe has led the court astray here, if the person arrested could show that he did not commit the misdemeanor for which he was arrested, no amount of probable cause could avail the policeman against an action for unlawful arrest. (*Stearns* v. *Titus*, 193 N. Y. 272; *People* v. *Defore*, 242 N. Y. 13; *McLoughlin* v. *New York Edison Co.*, 252 N. Y. 202.)

We are now confronted with a problem presented by the ruling of *Mapp* v. *Ohio* (367 U. S. 643) which forces us to distinguish, on criminal appeals, between evidence legally and illegally obtained. It is clear, therefore, that the old rule governing the legality of no-warrant misdemeanor arrests can no longer be determined by whether or not the jury ultimately convicts the defendant, at least where there is a claim that some of the evidence supporting the conviction was seized incident to an illegal arrest, the legality of which must be determined in order to determine whether the evidence seized incident thereto was the product of an unreasonable search. The circularity of such a test is apparent.

The majority has resolved the problem by holding that in the case of a no-warrant misdemeanor arrest, i.e., for a misdemeanor committed in the "presence" of the arresting officer, no misdemeanor is committed in anyone's "presence" unless what was directly observed could, in and of itself, sustain a conviction. That is to say, unless in retrospect sufficient evidence to convict was apparent to the arresting officer, the arrest is unlawful and all further evidence seized incident thereto is inadmissible notwithstand-

ing the degree of probable cause for the arrest and the persuasiveness of any additional evidence obtained through the search.

Section 177 does not, of course, so require. All it demands of a no-warrant misdemeanor arrest is that there be (1) a misdemeanor, and (2) that it be committed in the arresting officer's presence. It is not addressed to the question of how either of these two requisites is established. As far as section 177 is concerned, therefore, the arrest is legal *ab initio* if the officer was there when the alleged misdemeanor was committed and the jury convicts, thereby finding that the misdemeanor actually was committed. It is quite true that we must conform to the *Mapp* (*supra*) holding and the further constitutional requirement that "a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." (*Byars* v. *United States*, 273 U. S. 28, 29; *United States* v. *Di Re*, 332 U. S. 571, 595.) I think, however, that the majority has gone too far.[1] All that the Constitution requires in such a case is that there be probable cause for the search. If the arrest to which it is incident is otherwise lawful, and I have tried to show that it is here, the search is likewise lawful and the evidence admissible. (*Brinegar* v. *United States*, 338 U. S. 160.)

To summarize, I would not dilute the existing statutory requirement that the misdemeanor be actually committed in the arresting officer's presence, as ultimately determined by the jury. To conform to constitutional requirements governing searches, I would add that the officer must also have probable cause to believe that the proper statutory grounds for the arrest, to which the proposed search will

[1] Even accepting the reasoning of the majority, the policeman observed sufficient acts of the defendant to make out a prima facie case of the crime of book-making. The defendant's furtive conduct supplied the elements we noted as missing in *People* v. *Carpenito*, 292 N. Y. 498.

be incident, exist. In the case of misdemeanors, this would be probable cause to believe that a misdemeanor is being committed in the presence of the policeman. Such cause clearly existed here. I would, however, not add the requirement adopted by the court today. Such a rule will inevitably engage this court in a morass of reviewing no-warrant misdemeanor convictions to determine not only if there is sufficient evidence to support the conviction, but, collaterally, whether such evidence was apparent to the arresting officer prior to the search.

In *People* v. *Caliente*: Judgment reversed and the complaint dismissed.

Chief Judge DESMOND and Judges FULD, VAN VOORHIS and FOSTER concur with Judge FROESSEL; Judge BURKE dissents in an opinion in which Judge DYE concurs.

In *People* v. *Cognetta and Grecco*: Judgments reversed, the complaint dismissed and the fines remitted.

Judges FULD, VAN VOORHIS and FOSTER concur with Judge FROESSEL; Chief Judge DESMOND dissents and votes to affirm on the ground that in reason these crimes were committed "in the presence" of the officer within the meaning of section 177 of the Code of Criminal Procedure. (See *People* v. *Foster*, 10 N. Y. 2d 99, 102.) Judges DYE and BURKE dissent and vote to affirm for the reasons stated in the dissenting opinion in *People* v. *Perlman and Bernstein*, decided herewith.

In *People* v. *Perlman and Bernstein*: Judgments reversed, the complaint dismissed and the fines remitted.

Judges FULD, VAN VOORHIS and FOSTER concur with Judge FROESSEL; Chief Judge DESMOND dissents and votes to affirm on the ground that in reason these crimes were com-

mitted "in the presence" of the officer within the meaning of section 177 of the Code of Criminal Procedure. (See *People* v. *Foster*, 10 N. Y. 2d 99, 102.) Judge DYE dissents in an opinion in which Judge BURKE concurs.

In PEOPLE v. SESSA: Judgment reversed, the complaint dismissed and the fines remitted.

Chief Judge DESMOND and Judges FULD, VAN VOORHIS and FOSTER concur with Judge FROESSEL; Judges DYE and BURKE dissent and vote to affirm for the reasons stated in the dissenting opinion in *People* v. *Caliente*, decided herewith.

Judgments reversed, etc.